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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JEROME B. HANSEN,

Petitioner,

vs.

JOHN C. AHLGRIMM and HARLEY BROWN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO. _____

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on November 14, 1973.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit was entered on November 14, 1973 and is set forth in the appendix, pp. 1-3 and the order of the same court on the Motion for Rehearing is set forth in the appendix, p. 8. The decision and the order of the

United States District Court for the Eastern District of Wisconsin was entered on April 27, 1973 and is set forth in the appendix, pp. 4-7.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW

What are the perimeters of judicial immunity under a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure directed to a complaint filed under 42 U.S.C. Sec. 1983 alleging action by a state judge in excess of his jurisdiction and pursuant to a conspiracy to violate the constitutional rights of a plaintiff by the issuance of an unlawful warrant for imprisonment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves 42 U.S.C. Sec. 1983, and Rule 12 of the Federal Rules of Civil Procedure.

2. The case involves Sections 274.11, 247.30, 274.17, 247.39, 295.03 of the Wisconsin Statutes.

STATEMENT OF THE CASE

On January 10, 1972 the petitioner filed a complaint in the United States District Court for the Eastern District of Wisconsin as set forth in the appendix, pp. 9-17. In due course the respondent moved under Rule 12 of the Federal Rules of Civil Procedure to dismiss the complaint for failure to set forth a cause of action. On the present-

ment of the issues and filing of briefs the District Court granted the motion of the respondent in the decision and order entered on April 27, 1973 set forth in the appendix, pp. 4-7. Petitioner timely prosecuted an appeal to the United States Court of Appeals for the Seventh Circuit, briefs were duly filed and on November 14, 1973 the Court of Appeals entered the order set forth in the appendix, pp. 1-3 under Rule 22 of the Federal Rules of Appellate Procedure. A Petition for Rehearing and a brief in support thereof set forth in the appendix, pp. 18-21 was timely filed and the Court of Appeals denied said petition by its order dated December 10, 1973 set forth in the appendix, p. 8. The remainder of the issues raised on appeal are as of this date pending argument and decision in the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ESTABLISHES A BLANKET JUDICIAL IMMUNITY UNDER 42 U.S.C. Sec. 1983—AN IMMUNITY CONTRARY TO THE CASE LAW PRECEDENT OF THE UNITED STATES SUPREME COURT.

The doctrine of judicial immunity[1] is not rooted in the Constitution of the United States. Rather it is inherited as a matter of common law and was adopted with carefully drawn guidelines by the United States Supreme Court in *Bradley* v. *Fisher*, (1872) 13 Wall. 335, 20 L.Ed. 646. The doctrine did not develop or embrace absolute immunity. From the beginning the liability of a judge has been recognized if he acts without jurisdiction.

Bradley v. *Fisher* involved incidents arising from the trial of John Suratt for the murder of Abraham Lincoln. The trial was marked by some acrimony and at its conclusion the trial judge entered an order striking the name of one of the defense attorneys from the role of the attorneys practicing in that court affecting his disbarment. The judge claimed that the attorney had threatened him in ex parte meetings. This order of the trial court was overturned on appeal and the attorney commenced a separate civil action for damages against the judge alleging

[1] For a discussion of the history and advisability of the rule as now recognized see 79 Yale Law Journal 322 (1969) *"Liability of Judicial Officers under Sec. 1983."*

malicious motive. Mr. Justice Field writing for the majority established a doctrine of limited judicial immunity directed precisely at the facts before the court and carefully distinguished those areas where a judge could be responsible for damages:

> ". . . judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority . . .
>
> The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists, was taken by the court of King's bench, in *Ackerly* v. *Parkinson*, 3 M. & S. 411 . . . Mr. Justice Blanc said there was 'a material distinction between a case where a party

> comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;'. . .'' 13 Wall. 335, 351-353.

Applying the principles announced to the case before the court Justice Field found that the defendant Judge therein was indeed possessed of jurisdiction over the subject matter in order to render the judgment regardless of his motive or the apparent error of his judgment.

The holding of *Bradley* has not been diminished in any respect in the intervening years. The Circuit Court of Appeals for the Sixth Circuit spoke clearly on the concepts while sustaining the liability of a state judge for false imprisonment where the state judge was without jurisdiction in *Manning* v. *Ketcham,* (1932) 58 F.2d 942 as follows:

> ''. . . In determining the extent of the jurisdiction of its own courts, we will of course follow the decisions of the Court of Appeals of Kentucky. . .
>
> An affirmance results. When a judge acts in the clear absence of all jurisdiction, i.e. of authority to act officially over the subject-matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Such has been the law from the days of the case of, The Marshalsea, 10 Coke 68. It was recognized as such in Bradley v. Fisher, 13 Wall. (80 U.S.) 335, 351, 20 L.Ed. 646. In State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N.E. 762, 763, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.'

> In Rammage v. Kendall, 168 Ky. 26, 31, 181 S.W. 631, 634, L. R. A. 1916C, 1295 the Court of Appeals said: 'There is a general principle of universal application to all grades of judicial officers that a judge who is proceeding within the scope of his jurisdiction is not liable in an action for damages for the opinion he may deliver as such judge, nor for any rule or action he may take for the conduct of the business of this court. This principle, however, does not extend to make a judicial officer immune from damages for illegal acts which result in injuries to others or deprive them of their legal rights, when his acts are without the scope and limits of his jurisdiction. It follows that, if his illegal acts are without the scope and limits of his jurisdiction, he is liable, if damages result to others from such acts, whether he is actuated by malice, corrupt and impure motives or not. In the last state of the case the fact that his motives are impure and bad are considered only as aggravating the damages. When the judge acts illegally without the limits of his jurisdiction, he becames a trespasser, and is liable in damages as such. . .'
>
> Honesty of purpose and sincere belief that appellant was acting in the discharge of his official duty under his oath of office and for the public welfare is not available as a defense further than in mitigation of damages. . ." 58 F.2d at p. 949.

In 1959 the United States Supreme Court in *Barr* v. *Matteo*, 360 U.S. 564, 3 L.Ed. 2d 1434, 79 S.Ct. 1335 spoke to the issue in the context of congressional privilege from libel. Mr. Justice Harland speaking for a plurality of the court recognized the exceptions to immunity, quoting with approval the opinion of Judge Learned Hand in *Gregoire* v. *Biddle*, (CA 2 N.Y.) 177 F.2d 579, 581:

> ". . . The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they

> exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." 3 L.Ed. 2d at pp. 1441-1442.

In *Pierson* v. *Ray*, (1967) 386 U.S. 547, 18 L.Ed 2d 288, 87 S.Ct. 1213 the United States Supreme Court held that the doctrine of judicial immunity as outlined in *Bradley* applied in Civil Right cases brought under 42 U.S.C. Sec. 1983. However, Mr. Chief Justice Warren speaking for the eight member majority reannounced that the immunity attended only ". . . acts committed within their (judges) judicial jurisdiction as this court recognized when it adopted the doctrine in *Bradley*. . ." 18 L.Ed. 2d at p. 294, insert supplied.

Clearly then there is nothing in *Pierson* v. *Ray* which narrows the doctrine of judicial immunity as announced in *Bradley* in 1872. *Pierson* involved a situation where there was no claim that the judge acted without jurisdiction. In fact it was a matter of stipulated fact that the acts of the Judge defendant were within his jurisdiction.

The United States Court of Appeals for the Seventh Circuit has prior hereto evidenced clear understanding of the rule in *Jacobson* v. *Schaeffer*, (7th Cir. 1971) 441 F.2d 127 wherein Judge Duffy considers the history of the cases cited above and observes succinctly:

> "Jurisdiction then is the test and it too has been further refined. If a judge is viewed as acting 'in excess' of his jurisdiction, he still will be immune from suit. It is only when he has acted in the 'clear absence of all jurisdiction over the subject matter' that he may be sued for damages. *Bradley* v. *Fisher*, 13 Wall. 335, 351 (1871); *Rhodes* v. *Houston*, 202 F. Supp. 624 (1962). . ."

Also see *Skolnik* v. *Campbell*, (7th Cir. 1971) 454 F.2d 531.

A case most analogous to the instant case is *Wade* v. *Bethesda Hospital, et al.*, (1971 U.S. D.C. S.D. Ohio) 337 F. Supp. 671. In *Wade* the plaintiff complained against a state trial judge for violation of a constitutional right under 42 U.S.C. Sec. 1983 as a result of an order of the respondent judge that the petitioner be subject to surgical sterilization. The respondent judge claimed immunity on the basis that his order was within his power as a judge under the statutory scheme of the State of Ohio. In deciding that the respondent judge was not immune Judge Kinneary stated as follows:

> "We begin by defining the concept of jurisdiction as it is used in the context of judicial immunity. The cases are clear that the terms jurisdiction means that the judge must have both jurisdiction over the person and subject matter if he is to be immune from suit for an act performed in his judicial capacity. See, *Thompson* v. *Heither*, 235 F.2d 177 (6th Cir., 1956) and cases cited therein: *Ryan* v. *Scoggin*, 245 F.2d 54 (10th Cir. 1957). A third element, however, also enters into the concept of jurisdiction as used in this context. The particular decision which was given. See, *Cooper* v. *Reynolds*, 77 U.S. 308, 316 (1870); *National Malleable & Castings Co.* v. *Goodlet*, 195 F.2d 8 (7th Cir. 1952); *City of Phoenix* v. *Greer*, 29 P.2d 1062 (Supreme Ct., Ariz., 1934).

A judge will not lose his immunity because of a mere error in judgment even though the resultant act be in excess of the Court's jurisdiction. *Ryan* v. *Scoggin, supra; O'Bryan* v. *Chandler,* 352 F.2d 987 (10th Cir. 1965) *cert. den.* 384 U.S. 926, *rehearing den.* 385 U.S. 889. 'Excess of jurisdiction' as distinguished from entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, because conditions which alone authorize exercise of judicial power in the particular case are wanting and judicial power is not lawfully invoked. *Pogue* v. *Swink,* 284 S.W. 2d 868 (Supreme Ct. Mo. 1955).

Consequently, the third element in the concept of jurisdiction as used in the context of judicial immunity necessitates an inquiry into whether the defendant's action is authorized by any set of conditions or circumstances. This inquiry begins with an examination of the statutes under which defendant Gary presumed to act. . .

Defendant Gary found his authority to order sterilization in Section 5125.30, Ohio Revised Code, and in Section 2101.24, Ohio Revised Code. Section 5125.30 provides that when the hospitals for the mentally retarded are unable to receive additional patients, 'The probate judge shall then take such action as he deems necessary and advisable to provide for the detention, supervision, care and maintenance of said mentally retarded person. . .' Section 2101.24 sets out the jurisdiction of the probate court. Defendant Gary relied on the following language as providing authority for his order:

> 'The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.'

> It is the determination of this court that neither of these sections provided the defendant Gary with the conditions under Ohio law which would permit defendant Gary to order plaintiff to submit to sterilization, the Court determines that defendant Gary acted wholly without jurisdiction in this matter. Consequently, defendant Gary is not protected by the doctrine of judicial immunity."

It is obvious then that a judge is not immune from liability under 42 U.S.C. Sec. 1983 if the acts complained of were committed when the judge failed to have jurisdiction over the subject matter. The complaint in the case at bar alleged precisely such a situation and, therefore, it is respectfully submitted on its face was not the proper subject of a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure.

II

THE ORDER OF THE UNITED STATES CIRCUIT COURT FOR THE SEVENTH CIRCUIT AS ENTERED AFFIRMED WITHOUT EXPLAINING THE DECISION OF THE DISTRICT COURT ON UNSOUND LEGAL BASES IN TWO RESPECTS:

(1) An erroneous interpretation of applicable state law; and

(2) In violation of the principles governing Rule 12 of the Federal Rules of Civil Procedure.

The Court of Appeals in its decision appears to have decided that under *Freeman Printing Co.* v. *Luebke*, 36 Wis. 2d 298 (1967) and *Carpenter Baking Co.* v. *Bakery S.D. Local Union*, 237 Wis. 24, 37 (1941) that under Wis-

consin law trial courts retain jurisdiction to enforce judgments pending appeal. An analysis of *Freeman* and *Carpenter Baking* shows that Wisconsin law is exactly to the contrary. Both cases clearly state that the trial court, upon the perfection of an appeal to the Supreme Court (the situation that existed as a matter of undisputed fact in the case at bar) retains jurisdiction only for the limited purpose of preserving the status quo of the subject matter involved in the judgment appealed from that the part of the judgment which may be prohibitory in character remains in force and effect and is not stayed pending appeal. The issuance of the warrant complained of by the respondent judge was clearly an order beyond jurisdiction of the subject matter as defined under Wisconsin law. Section 274.11(4), Wis. Stats. provides:

> "The right of appeal shall exist from the time of the entry of the appealable order or judgment and *in cases of appeal the supreme court shall have jurisdiction over the subject matter of the action from that time.* The procedural requirements of subs. (1), (2) and (3) and of this chapter shall relate only to the jurisdiction of the court over the parties to the appeal." [Emphasis supplied]

For the respondent judge to have retained jurisdiction it is necessary that a specific Wisconsin statute be relied upon for there is no dispute between the parties that the warrant for arrest was entered after the petitioner had perfected an appeal to the Wisconsin Supreme Court. The parties briefed the question of the statutory authority *vel non* for both the District Court and the Circuit Court of Appeals and in the Petition for Rehearing the petitioner requested clarification from the Circuit Court of Appeals as to what sections of Wisconsin statutory law were to

be held to allow the warrant as entered. See appendix, pp. 18-21. It is respectfully submitted that the opinion entered did not respond to the issue as framed.

Concerning the procedural requirements of a motion under Rule 12 of the Federal Rules of Civil Procedure it is clear that the only issue to be considered on the motion was whether the *complaint* alleges the acts of the respondent judge to be committed without subject matter jurisdiction. The complaint in the case at bar does so allege and as stated above an analysis of the case law precedent and statutory law of the State of Wisconsin clearly reveals that at the time the respondent judge issued the warrant for the arrest of the petitioner he lacked jurisdiction over the subject matter.

It is apparent that the district court failed to properly apply the rules obtaining in deciding the issue on a motion under Rule 12(b) of the Federal Rules of Civil Procedure.

On a motion to dismiss brought pursuant to Rule 12(b) the allegations of the complaint must be viewed in the light most favorable to the petitioner, assuming the truth of the factual allegations contained therein. *Conley* v. *Gibson*, (1957) 335 U.S. 41, 45-48, 2 L.Ed. 2d 80, 78 S.Ct. 99. On appeal from dismissal for failure to state a claim on which relief can be granted the court of appeals must accept as true petitioner's allegations of facts, together with such reasonable inferences as may be drawn in petitioner's favor. *Murray* v. *The City of Milford*, (C.A. 2nd 1967) 380 F.2d 468; *Barnes* v. *Merritt*, (C.A. 5th 1967) 376 F.2d 8; *Mississippi River Fuel Corp.* v. *Slayton*, (C.A. 8th 1966) 359 F.2d 106. Factual issues are not to be determined on a motion to dismiss. *Scozzafava* v. *U.S.*, (S.D. N.Y. 1961) 199 F.Supp. 43.

The complaint in the case at bar alleged precisely that the respondents acting in concert and "ACTING WITHOUT JURISDICTION UNDER THE LAWS OF THE STATE OF WISCONSIN" effectuated the issuance of an illegal warrant of arrest for the plaintiff—see ¶ 11, 12, 13, 14 and 15 of the complaint, appendix, pp. 11-12.

The decision of the district court commences with the assertion that the procedures requested, which resulted in the warrant of arrest, "were quite common and had long been provided for by the Wisconsin Statutes. Wis. Stats. §§ 247.30 and 274.17." Support for that assertion could not be found on the record before the district court. The conclusion is unfounded and unsupported by a reading of those statutes cited.

The petitioner had perfected an appeal from the judgment rendered against him in the divorce and thus under Wisconsin law the respondent had no jurisdiction over the subject matter of the corpus of the judgment.

> "An appeal from a judgment or order strips the trial court of jurisdiction with respect to the subject matter of the judgment or order, except in certain unsubstantial and trivial matters, and the supreme court then has jurisdiction until the appeal has been determined. The reason for this rule is that, once the appeal has been taken, the trial court ought not to have the power to do anything that might adversely affect the rights and interests of the parties in the appeal." *Estate of Mayer,* (1966) 29 Wis. 2d 497, pp. 504-505.

See also *Gateway City Transfer Co., Inc.* v. *Public Service Commissioner,* (1948) 253 Wis. 229.

The statutes cited by the district court are absolutely silent regarding vesting any jurisdiction of the state trial court for the purpose of compelling the satisfaction of the judgment or the posting of surety therefore.

Sec. 274.17 Wis. Stats. provides that an appeal shall not automatically stay execution of a judgment, which merely allows a prevailing party to seek civil execution under Chapter 272 Wis. Stats. if a stay is not obtained. NOTHING CAN BE READ INTO THE STATUTE WHICH CAN PUT A LITIGANT IN PERIL OR JEOPARDY OF ARREST OR IMPRISONMENT FOR FAILURE TO OBTAIN A STAY OF EXECUTION ON A MONEY JUDGMENT. Any statute so providing would be of doubtful constitutionality for it would in effect provide imprisonment for debt.

Sec. 247.39 Wis. Stats. is completely immaterial to the issues. It provides merely that on appeal alimony or support may be allowed during the pendency of the appeal under Wisconsin Supreme Court Rule 251.72. In the case at bar there were no children and no alimony award.

In like manner §247.37 Wis. Stats. cited by the district court in conjunction with §295.03 Wis. Stats. as authority for commitment of the plaintiff to jail, refers in its pertinent parts *exclusively* to alimony or support orders. Again that statute is irrelevant because the instant case involved no alimony or support issue or order.

Sec. 295.03 Wis. Stats. carefully outlines those narrow areas for which a party can be held in contempt and relate again to orders concerning alimony or support in divorce cases and orders for suit costs in other cases. The warrant for arrest in the case at bar was not based upon any failure contemplated in §295.03 Wis. Stats. on the record before the district court.

Therefore, it is respectfully submitted that there was not under Wisconsin Statutes any "common and long provided for" procedure which authorized a commitment

order or warrant of arrest for the appellant. To the contrary there was absolutely no authority for such an order.

Significant, of course, from the standpoint of the procedure involved, is that the analysis of this body of Wisconsin law vis-a-vis the rationale which the district court ascribed to the defendants was not properly considered on a motion to dismiss under Rule 12(b). The decision as made was made in a factual vacuum. The complaint recited that the defendant acting in concert and *WITHOUT* jurisdiction effected an illegal warrant for the arrest of the appellant. On a motion to dismiss pursuant to Rule 12 those allegations must be accepted as true and could only be challenged on a motion for summary judgment pursuant to Rule 56. The insertion of a statutory scheme and the interpretation thereof as a defense to the complaint necessitates the consideration of matters outside the pleadings—in such circumstances the proper procedure to join the issues is Rule 56. To quote the Per Curiam opinion of the United States Supreme Court in *Carter* v. *Stanton,* (1972) 405 U.S. 669, 31 L.Ed. 2d 569, 92 S.Ct. 1232:

> ". . . it appears that at the hearing on the motion to dismiss, which was based in part on the asserted failure 'to state a claim upon which relief can be granted', . . . matters outside the pleadings were presented and not excluded by the court. The court was therefore required by Rule 12(b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. Under Rule 56, summary judgment as to any material fact and the moving party is entitled to judgment as a matter of law. If this is the course the District Court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim.

> In this posture of the case, we are unconvinced that summary judgment was properly entered. The judgment of the District Court is therefore vacated and the case is remanded to that court for proceedings herewith." 31 L.Ed. 2d at p. 572.

The district court in the decision improperly considered matters outside of the complaint and inserted an affirmative defense based upon interpretation of the Wisconsin Statutes which were assumed to have been made by the respondent.

Since the resolution of the motion involved the consideration of matters de hors the record the motion was one traditionally denominated a "speaking motion", 2A Moore's Federal Practice, pp. 2287-2313. As Moore notes such a motion is properly to be treated as a motion for summary judgment and the provisions of Rule 56 of the Federal Rules of Civil Procedure apply. Issues of jurisdiction can be involved in "speaking motions" and in those instances the parties should be afforded the opportunity to adduce evidence on that issue. *Collins* v. *New York Cent. Sys.*, (CA D.C. 1963) 327 F.2d 880, 7 FR. Serv. 2d 12b. 22, Case 2; *Harmon* v. *Supreme Court of Cal.* (CA 9th 1962) 307 F.2d 796, 6 FR. Serv. 2d 12b. 22, Case 3.

Of course, the most obvious evidence to be considered would be the testimony of the respondents which the petitioner had proposed to obtain via the depositions. The district court in its decision created for the respondents an absolute immunity without a scintilla of evidence presented that the acts of the respondent were justified under any interpretation of Wisconsin law.

CONCLUSION

For the reasons stated above certiorari should be granted and the order of the United States Court of Appeals for the Seventh Circuit dated November 14, 1973 should be reversed.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Appellant

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 14, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

JEROME V. HANSEN,

Plaintiff-Appellant,

No. 73-1603 vs.

JOHN C. AHLGRIMM and HARLEY BROWN,

Defendant-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 72-C-20

John W. Reynolds, Judge.

Motion for Affirmance under Rule 22.

O R D E R

As to the issues raised in points I and II of appellant's brief, the motions for affirmance without oral argument are granted. The order staying the taking of depositions was within the trial court's discretion because the pos-

sibility of harassment was apparent and no facts which could be established at the deposition were relevant to the motions to dismiss. It was proper not to treat the motions to dismiss as motions for summary judgment because even on a motion to dismiss, the trial judge could take judicial notice of Wisconsin law, and was not bound to accept as true the legal conclusion alleged in the complaint that defendant Ahlgrimm acted without jurisdiction.

Wisconsin trial courts retain jurisdiction to enforce judgment pending appeal. *Freeman Printing Co.* v. *Luebke*, 36 Wis.2d 298 (1967); *Carpenter Baking Co.* v. *Bakery S.D. Local Union*, 237 Wis. 24, 37 (1941). Plaintiff charges that this is unfair, but he cites no specific authority for the proposition that it is not the law of Wisconsin. Consequently, we conclude that defendant Ahlgrimm had jurisdiction to enter the order complained of and that he is therefore immune to suit for damages. His motion for affirmance without oral argument is granted as to the damage claim.

Plaintiff also seeks a declaratory judgment and "such other relief as shall be appropriate." Defendant Ahlgrimm is not immune to a complaint for declaratory judgment. But we cannot resolve this issue without oral argument because we have no way of knowing whether any case or controversy remains after the dismissal of the damage claim. The motion for affirmance without oral argument is denied as to this issue.

The remainder of defendant Brown's motion for affirmance without oral argument is also denied. Brown's brief appears to assume that he could not have acted under color of law unless he conspired with defendant Ahlgrimm. But it is possible that he conspired with the law enforcement officials who attempted to execute the bench warrant. Fur-

ther, paragraph 10 of the complaint appears to allege that prosecuting the Order to Show Cause was an act under color of law without regard to any conspiracy. Section 1983 suits against private individuals to enforce rights announced in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), may be relevant here. See, *e.g.*, *Klim* v. *Jones*, 315 F.Supp. 109 (N.D. Cal. 1970). We are unable to resolve these issues without further comment from the parties.

IT IS FURTHER ORDERED that:

1. The Order of the trial court staying the taking of depositions is affirmed;

2. The decision of the trial court in refusing to treat the motions to dismiss as motions for summary judgment is affirmed;

3. The dismissal of damage claims against defendant Ahlgrimm is affirmed; and

4. The remaining issues in the case shall be set for oral argument, and the parties are directed to be prepared to discuss the following points in light of this decision:

a. Whether any case or controversy remains between plaintiff and defendant Ahlgrimm;

b. Whether defendant Brown acted under color of law;

c. Whether defendant Brown is immune from suit; and

d. Whether, if defendant Brown acted under color of law and is not immune from suit, his alleged acts violated plaintiff's civil rights.

e. Whether, since the act of defendant Brown, complained of was the commencement of a proceeding in a state trial court with jurisdiction, abstention based on comity would be appropriate because of the availability of state appellate remedies.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 72-C-20

JEROME B. HANSEN,

Plaintiff,

v.

JOHN C. AHLGRIMM and HARLEY BROWN,

Defendants.

DECISION AND ORDER

In October 1970 Jerome and Betty Hansen were divorced. Jerome did not like the divorce judgment which ordered him to pay more than $100,000, and he appealed to the Wisconsin Supreme Court. Betty then sought an order granting her temporary alimony and attorney's fees while the appeal was in progress. She also sought to compel Jerome to perform the judgment or execute an undertaking. Her requests were quite common and had long been provided for by the Wisconsin Statutes. Wis. Stats. §§ 247.39 and 274.17. The orders were duly entered but were, unfortunately, no more than Jerome's liking than the original judgment itself. Jerome ignored them and in accordance with statute was committed to the county jail. Wis. Stats. §§ 247.37 and 295.03. Jerome then filed this

civil rights action in federal court alleging that the county judge who entered the orders and the attorney who represented his wife had conspired to deprive him of his liberty and various other constitutional rights in violation of 42 U.S.C. § 1983. Five thousand dollars in compensatory damages and $200,000 in punitive damages are sought. Defendants have moved to dismiss the complaint for failure to state a valid claim. Their motion is granted.

On motion to dismiss, all allegations of fact in plaintiff's complaint are assumed to be true. Legal conclusions in the complaint, of course, are not. The only additional factual allegations in the complaint in this case are that the defendant judge and the defendant attorney did what they did for the purpose of forcing plaintiff to abandon or delay his appeal under peril of imprisonment. Allegations of the damage caused by the conspiracy are also made.

Counsel for both parties have dealt at length with whether the defendant judge's actions were within his authority under state law. That, of course, is a question of state law, of little relevance to the federal question plaintiff is trying to raise here. As I understand the conclusory complaint, plaintiff is contending that the orders to pay temporary alimony and either perform the judgment or execute an undertaking while the appeal is in progress combined with the imprisonment of plaintiff for disobeying the orders offend notions of fundamental fairness and thus violate due process of law. Although the defendants' actions do not appear improper, I need not deal with the merits of plaintiff's contention, for this action is barred at the threshold by the doctrines of judicial immunity and state action.

Plaintiff does not deny that the defendant judge was acting within his judicial role and attempting to perform his official duties. He is therefore immune from a damage suit against him as an individual under the Civil Rights Act. *Pierson* v. *Ray,* 386 U.S. 547 (1967); *Jacobson* v. *Shaefer,* 441 F.2d 127 (7th Cir. 1971); *Brown* v. *Dunne,* 409 F.2d 341 (7th Cir. 1969); *Sullivan* v. *Kelleher,* 405 F.2d 486, 487 (1st Cir. 1968); *Agnew* v. *Moody,* 330 F.2d 868, 869 (1964). The judge's motive in acting within his judicial role does not affect the scope of his immunity.

Had this civil rights suit been against the defendant attorney alone, it is clear that no state action would have existed. *Reinke* v. *Richardson,* 279 F.Supp. 155 (E.D. Wis. 1968); *Kregger* v. *Posner,* 248 F.Supp. 804, 806 (E.D. Mich. 1966); *Pugliano* v. *Staziak,* 231 F.Supp. 347, 351 n. 5 (W.D. Pa. 1964), aff'd 345 F.2d 797 (3rd Cir. 1965). Evidently plaintiff contends that because the attorney allegedly conspired with the judge, a state officer, the attorney's actions became state actions with the rule of *United States* v. *Price,* 383 U.S. 787, 794 (1966), even though the state officer is himself immune from suit. Courts faced with this contention have, however, consistently rejected it holding that to come within the rule of *Price* the private citizen must conspire with a state official against whom a valid claim could be stated. *Haldane* v. *Chagnon,* 345 F.2d 601, 604-605 (9th Cir. 1965); *Stambler* v. *Dillion,* 302 F.Supp. 1250, 1255 (S.D. N.Y. 1969); *Shakespeare* v. *Wilson,* 40 F.R.D. 500, 504-505 (S.D. Cal. 1966).

Whether the rule of *Price* should be this narrowly construed or not, showing state action requires something more than the conclusory allegations of conspiracy in plaintiff's complaint. A complaint containing no pleaded facts describing the conspiracy and the extent to which it

connected the private citizen to the state is insufficient. *Guedry* v. *Ford*, 431 F.2d 660, 664 (5th Cir. 1970); *Morgan* v. *Sylvester*, 125 F.Supp. 380 (S.D. N.Y. 1954) aff'd 220 F.2d 758 (2d Cir. 1955). See also *Fletcher* v. *Hook*, 446 F.2d 14 (3rd Cir. 1971).

IT IS THEREFORE ORDERED that defendants' motion to dismiss the complaint be and it hereby is granted.

Dated at Milwaukee, Wisconsin, this 27th day of April, 1973.

John W. Reynolds
U. S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 10, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

JEROME B. HANSEN,
Plaintiff-Appellant,

No. 73-1603 vs.

JOHN C. AHLGRIMM and HARLEY BROWN,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.

(72 C 20)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

APPENDIX D

U. S. DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

Civil Action File No. 72-C-20

JEROME B. HANSEN,

Plaintiff,

vs.

JOHN C. AHLGRIMM, and HARLEY BROWN,

Defendants,

COMPLAINT

JURISDICTION

The plaintiff, Jerome B. Hansen, by his attorneys, Samson, Friebert, Sutton & Finerty, alleges and shows to the court as follows:

1. That the plaintiff brings this action pursuant to the provisions of the Civil Rights Act, 42 USC Sec. 1983 to obtain relief against the defendants for deprivation by the defendants under color of law of the rights, privileges and immunities secured to the plaintiff by the 8th, 9th and 14th Amendments to the Constitution of the United States.

2. Jurisdicion of this action is conferred upon this court by 28 USC Sec. 1343 and 42 USC Sec. 1983.

CAUSE OF ACTION

3. The plaintiff is and was at all times hereinafter material, an adult citizen of the United States and a resident of the Eastern District of Wisconsin.

4. The defendant, John C. Ahlgrimm is and was at all times hereinafter material, an adult citizen of the United States and a resident of the Eastern District of Wisconsin, and the duly elected Judge of Branch 4 of the County Court for Racine County, Wisconsin.

5. The defendant, Harley Brown is and was at all times hereinafter material, an adult citizen of the United States and a resident of the Eastern District of Wisconsin, and an attorney duly licensed to practice law in the State of Wisconsin.

6. On October 21, 1970 a judgment of divorce was entered in Branch 4 of the County Court of Racine County, Wisconsin, the defendant John C. Ahlgrimm, Judge presiding, severing the bonds of marriage between the plaintiff and Betty K. Hansen and at those proceedings and at all subsequent proceedings Betty K. Hansen was represented by the defendant, Attorney Harley Brown.

7. Pursuant to the judgment of divorce entered in paragraph 6 above, the plaintiff was ordered to pay to Betty K. Hansen the amount of $105,616.20 in full settlement of the estate of the parties.

8. Pursuant to the laws and statutes of the State of Wisconsin then and there obtaining, the plaintiff through his attorneys, perfected an appeal from the judgment reflected in paragraphs 6 and 7 above.

9. On March 23, 1971, the defendant, Harley Brown, prosecuted an Order To Show Cause on behalf of Betty K. Hansen requesting the defendant, Judge John C. Ahlgrimm issue an alternative order that the plaintiff pay the sum ordered under the divorce decree or a warrant issue committing the plaintiff to a place of imprisonment.

10. The plaintiff is informed and verily believes that the defendant Harley Brown prosecuted said Order To Show Cause without legal basis under color of law for the purpose, inter alia, of forcing the plaintiff to forfeit his appellate rights under peril of imprisonment and to deprive him of his liberty without due process of law in violation of the rights of the plaintiff as guaranteed under the 8th, 9th and 14th Amendments to the Constitution of the United States.

11. On March 24, 1971 the defendant, John C. Ahlgrimm, acting under color of law as a Judge of the County Court of Racine County, Wisconsin, acting without jurisdiction under the laws of the State of Wisconsin and acting upon the Order To Show Cause presented by the defendant Harley Brown, entered an order against the plaintiff as more clearly appears from Exhibit 1 attached hereto and made a part hereof.

12. On June 17, 1971 the defendant John C. Ahlgrimm again acting under color of law as a Judge of the County Court, Racine County, Wisconsin and acting without jurisdiction under the laws of the State of Wisconsin, ordered that a warrant issue for the arrest and imprisonment of the plaintiff for failure to comply with the order as reflected in Exhibit 1.

13. Between March 23, 1971 and July 15, 1971 the defendants acted in concert under color of law as above described in paragraphs 9 through 12 to deprive the plaintiff of rights, privileges and immunities to which he was entitled under the Constitution of the United States including due process of law, privacy and freedom from cruel and unusual punishment under the 8th, 9th and 14th Amendments to the Constitution of the United States.

14. As the proximate result of the conspiracy of the defendants and the warrant issued for the arrest and imprisonment of the plaintiff, the plaintiff was forced to flee his home and his home community and enter hiding as a fugitive hunted by law enforcement officials, all to his great mental anguish, extreme embarrassment and humiliation.

15. That as a proximate result of the conspiracy aforedescribed, the plaintiff further was forced to act against his will in the following particulars:

a. To forfeit his rights of appellate review in the courts of the State of Wisconsin regarding the judgment entered against him on October 21, 1970 as reflected in paragraphs 6 and 7 above.

b. To compromise the settlement and accept as terms of the compromise dismissal of litigation then pending before the United States District Court for the Eastern District of Wisconsin.

16. As a proximate result of the conspiracy aforedescribed the plaintiff was obliged to retain legal counsel and defend against the warrant issued, all to his damage in the amount of $5,000.00.

WHEREFORE, plaintiff prays:

1. That an order issue declaring that the acts of the defendants aforedescribed culminating in the issuance of the warrant for the arrest and imprisonment of the plaintiff violated rights, privileges and immunities as guaranteed to the plaintiff under the Constitution of the United States.

2. That a judgment be entered against the defendants and each of them in the amount of $5,000.00 compensatory damages, and $200,000.00 punitive damages, together with costs and reasonable attorneys' fees.

3. For such other relief as shall be appropriate.

Samson, Friebert, Sutton & Finerty
By */s/ Robert H. Friebert*
Robert H. Friebert
710 North Plankinton Avenue
Suite 840
Milwaukee, WI 53203

JURY DEMAND

The plaintiff by Samson, Friebert, Sutton & Finerty, his attorneys, demands that all issues of fact in the above entitled action be tried and submitted for determination to a jury of twelve (12) members.

Samson, Friebert, Sutton & Finerty
By */s/ Robert H. Friebert*
Robert H. Friebert
Attorneys For Plaintiff

EXHIBIT 1

STATE OF WISCONSIN

COUNTY COURT RACINE COUNTY

FAMILY COURT BRANCH

BETTY K. HANSEN, Plaintiff,

-vs-

JEROME B. HANSEN, Defendant.

ORDER

The Order to Show Cause returnable on the 23rd day of March, A.D., 1971, at 1:30 o'clock in the afternoon of said day having come on for hearing before the Honorable John C. Ahlgrimm, County Judge, and the appearance being as follows, to-wit: Betty K. Hansen personally and by Harley Brown, her attorney; the defendant Jerome B. Hansen having failed to appear personally but appeared by Milton R. Bordow, his attorney, and upon the Affidavit of the plaintiff, upon the testimony of her witnesses, the defendant having offered no evidence, upon the argument of counsel and upon all of the records, files and exhibits herein.

That after due consideration of all of the proof, the evidence, the testimony, the documents and arguments of counsel and being fully advised in the premises, I, John C. Ahlgrimm, Judge of County Court #4 of Family Court Branch, Racine County, before whom this action was tried

and before whom this hearing was held, do hereby make the following findings:

FIRST: That from the commencement of this action, there has been a record of orders to show cause, three of them with respect to contempt of the defendant, orders, failures to comply by the defendant, failure to appear by the defendant and failure to act. The record is very complete showing the intent of the defendant, his attitude towards the entire proceedings, his previous actions, his continual actions, his failure to pay, his failure to follow the orders of this Court, his evasiveness and his appearance in Court not bringing books and not bringing documents when necessary. The defendant has been evasive and the Court has to make some decision about witnesses much as a jury would do with respect to the demeanor of the witness, the things that they say, their lack of knowledge and things of that nature. The payments on the homestead of the parties have not been made, contrary to Court order, and aren't being made deliberately. Considering all of these things and the record, and the testimony of the plaintiff in Court today, show a distinctive form and part of a pattern on the part of the defendant, there is no other conclusion except that this is part of a design or nature of the defendant herein.

SECOND: That in order to protect the plaintiff and her rights and upon her testimony, she is unable to pay and has insufficient funds to properly defend the judgment on appeal unless the Court enter an order for suit money, counsel fees and disbursements pending said appeal. That the sum of Two Thousand Seven Hundred Sixty ($2,760.00) Dollars is a reasonable amount for counsel fees and the sum of Three Hundred Twenty ($320.00) Dollars is a reasonable amount for disbursements in said appeal.

THIRD: That the defendant has not complied with the Judgment of this Court in any respect. That based upon all of the records, files and proceedings herein, it appears that the rights of the plaintiff require protection during the pendency of this appeal, which protection the defendant is well able to provide. This protection is necessary so that the plaintiff will not be deprived of the assets assigned to her by said judgment as affirmed or modified by the Supreme Court, whether said assets are intentionally or inadvertently dissipated, disposed of or secreted. That even though the mortgage upon the homestead of the parties occupied by the plaintiff is seriously in default and under threat of foreclosure, that because of the fact that she is employed, because of the protection of the marital assets to be provided by this order, and because the appeal should be completed before a foreclosure sale, no alimony will be granted to the plaintiff.

Upon all of the foregoing,

IT IS HEREBY ORDERED:

(1) That no alimony or maintenance is awarded to the plaintiff during the pendency of this appeal.

(2) That the defendant shall pay to the attorney for the plaintiff the sum of $2,760.00 as counsel fees and $320.00 as disbursements to enable the plaintiff to attempt to sustain the judgment upon appeal, said sum shall be paid within forty-five (45) days from the date of this hearing on March 23, 1971.

(3) That execution of the judgment entered in this matter dated October 21, 1970, shall not be stayed unless an Undertaking be executed on the part of the defendant-appellant by at least two sureties to the effect that if the judgment appealed from or any part thereof be affirmed,

the appellant will pay the amount directed to be paid by the judgment or the part of such judgment as to which the judgment shall be affirmed, if it be affirmed only in part, and that the appellant will pay all damages which the plaintiff-respondent may have sustained by the doing or not doing of the acts or things directed to be done by the judgment appealed from, together with all damages which shall be awarded against the appellant upon the appeal. Said Undertaking shall be in the sum of One Hundred Thousand ($100,000.00) Dollars and shall be filed with this Court within twenty (20) days from the date of this hearing, March 23, 1971.

Upon failure of the defendant-appellant to execute and file the Undertaking described above, the defendant is hereby ordered to pay the sums set forth in the Judgment of this Court in this action, and to deposit the stock certificates of Gales Manufacturing Corporation owned by the defendant with the Court and further comply in all other respects with said judgment within twenty (20) days from the date of this hearing, March 23, 1971.

In the event the defendant-appellant fails to comply with either of the above alternatives, then, pursuant to Section 247.30 and Section 295.03 of the Wisconsin Statutes, and pursuant to all of the other and additional statutory and inherent powers of the Court to enforce its judgments, a warrant may issue from this Court upon the affidavit of the plaintiff, committing the defendant-appellant to the County Jail until the Undertaking required is filed or the judgment be complied with or until his discharge pursuant to law.

Dated this 24th day of March, A.D., 1971.

By The Court:

s/ *John C. Ahlgrimm*

County Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 73-1603

JEROME B. HANSEN,

Plaintiff-Appellant,

vs.

JOHN C. AHLGRIMM and HARLEY BROWN,

Defendant-Appellees.

PETITION FOR REHEARING

Now Comes the plaintiff-appellant by his attorneys, Samson, Friebert, Sutton, Finerty & Burns by Robert E. Sutton and hereby moves the court for a rehearing pursuant to Rule 40 of the Rules of Appellate Procedure of the United States Court of Appeals for the 7th Circuit on the following grounds:

1) In respect to the issue raised in I of the Appellant's Brief and decided by the court in its decision of November 14, 1973 appellant respectfully request clarification of the ruling therein. The court by its ruling apparently decided that under *Freeman Printing Co.* v. *Luebke,* 36 Wis. 2d 298 (1967) and *Carpenter Baking Co.* v. *Bakery S.D. Local Union,* 237 Wis. 24, 37 (1941) that under Wisconsin law trial courts retain jurisdiction to enforce judgments

pending appeal. However, *Freeman* and *Carpenter Baking* hold to the contrary.

Carpenter Baking Co. stands foursquare for the proposition that the trial court, upon the perfection of an appeal to the Supreme Court, retains jurisdiction *only for the limited purpose of preserving the status quo of the subject matter involved in the judgment appealed from*—that the part of the judgment which may be prohibitory in character remains in force and effect and is not stayed pending appeal. It is respectfully submitted that that particular issue is of absolutely no significance in the resolution of the question raised. The order entered by the defendant, Ahlgrimm, was not in the nature of prohibitory or injunctive relief. It clearly was an order directly involved and dependant upon the judgment from which appeal had been perfected. The holding of *Carpenter Baking Co.* appears unavailing to the circumstances of the case at bar except from the standpoint that it squarely holds that upon an appeal being perfected the trial court loses jurisdiction for all purposes *except* maintaining the status quo.

The holding in *Freeman* is:

> "The general rule relating to the effect of an appeal on the jurisdiction of the trial and appellate court is that *in the absence of a contrary statute* an appeal duly perfected divests the trial court of jurisdiction of the subject matter of the appeal and transfers it to the appellate court where it remains until the appellate proceeding terminates and the trial court regains jurisdiction. Annot., 89 A.L.R. 2d 1236. The rule is stated substantially the same in 4 Am. Jur. 2d, *Appeal and Error,* p. 830, sec. 352, and in 4A C.J.S., *Appeal and Error,* p. 395, sec. 607, where reference is made to exclusive power or the cause, action or subject matter. In the very early case of *Waterman* v. *Raymond* (1856), 5 Wis. 185, the court in deciding it

had the power to order a stay of proceedings in the trial court during an appeal said, '. . . the appeal removes the subject matter, and all matters connected therewith, to this court, and is thenceforth under its control.' *The concept that the appellate court in the absence of statute has exclusive jurisdiction over the subject matter of the appeal for appeal purposes runs through all the Wisconsin cases* although it is recognized there is a diversity in the language in stating the rule and the determinations of what constitutes the subject matter of an appeal." [Emphasis Supplied] 36 Wis.2d at p. 302.

Obviously then for the defendant, Ahlgrimm, to have retained jurisdiction in the case at bar a specific statute must be relied upon, for there is no dispute between the parties that the order in question was entered after the plaintiff-appellant had perfected an appeal to the Wisconsin Supreme Court. The parties briefed the question of the particular statutory authority vel non both in the District Court and in the Circuit Court of Appeals. The position of the defendants was that certain sections of the Wisconsin statutory law allowed the order complained of. The position of the plaintiff-appellant was that the order complained of was not authorized by any Wisconsin Statute. The parties devoted extensive argument pro and con regarding the Wisconsin Statutes. See Brief of Plaintiff-Appellant, pp. 4-7, 13-15, Brief of Defendant-Appellee, Brown, pp. 1-7, Brief of Defendant-Appellee, Ahlgrimm, pp. 2-4, 13-15 and Reply Brief of Plaintiff-Appellant, pp. 6-10.

The opinion of November 14, 1973 does not speak to a resolution of that dispute and plaintiff-appellant respectfully submits that in the posture of the case all parties are entitled to know what Wisconsin Statutes the Court con-

siders to have conferred jurisdiction on the defendant, Ahlgrimm, to enter the order complained of.

Plaintiff-appellant recognizes that the order of November 14, 1973 of this court did not resolve all of the issues on the appeal and, therefore, it is unclear under the rules of appellate procedure whether this petition for rehearing is timely made or should await the final resolution of the appeal. However, this motion is made to protect the right of the appellant to a petition for rehearing directed to the issues raised in point I.

As to the issue in point II also decided in the opinion of November 14, 1973 plaintiff-appellant does not petition for rehearing.

Dated this 26th day of November, 1973 at Milwaukee, Wisconsin.

Samson, Friebert, Sutton, Finerty & Burns

By Robert E. Sutton
Attorneys for Plaintiff-Appellant

P. O. Address:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1228

JEROME B. HANSEN,

Petitioner,

vs.

JOHN C. AHLGRIMM and
HARLEY BROWN,

Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Dennis J. Flynn
Attorney for Respondent
John C. Ahlgrimm
Racine County Courthouse
Racine, Wisconsin 53403

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1228

JEROME B. HANSEN,

Petitioner,

vs.

JOHN C. AHLGRIMM and
HARLEY BROWN,

Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion and order delivered in the courts below are not as yet officially reported, but are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Seventh Circuit improperly affirm the dismissal of a complaint filed under 42 U.S.C. Sec. 1983 on the basis of judicial immunity of a state court judge acting within his judicial role?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

State Statutes Involved: Sections 247.30, 247.37, 247.39, 251.72, 274.11, 274.17 and 295.03 of the Wisconsin Statutes. The cited statutes are set forth in the Appendix, pages 18-23.

This case involves 42. U.S.C. Sec. 1983, and Rule 12 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

In October, 1970, Jerome and Betty Hansen were divorced. Jerome did not like the divorce Judgment which ordered him to pay more than $100,000, and he appealed to the Wisconsin Supreme Court. Betty then sought an Order granting her temporary alimony and attorney's fees while the appeal was in progress. She also sought to compel Jerome to perform the Judgment or execute an undertaking. Both requests were made pursuant to the provisions of secs. 247.39 and 274.17 Wisconsin Statutes. The orders were duly entered by Judge Ahlgrimm. However, Jerome ignored the temporary orders and in accordance with provisions of secs. 247.39 and 295.03 Wisconsin Statutes, was ordered committed to jail. Jerome

then filed this civil rights action in Federal Court alleging that the County had conspired to deprive him of his liberty and various other constitutional rights in violation of 42 U.S.C. sec. 1983. Jerome sought $5,000 in compensatory damages and $200,000 in punitive damages. Both the attorney who represented Jerome's wife and the Judge filed a motion to dismiss for failure to state a valid claim. Judge Reynolds granted that motion.

Plaintiff appealed on four issues to the United States Court of Appeals for the Seventh Circuit. Pursuant to a motion to affirm without oral argument, the Court of Appeals affirmed the District Court in two issues by answering no to the issues:

I. Under the circumstances then and there obtaining, did the District Court err in ordering stays of the taking of depositions of defendants?

II. Did the District Court err in deciding the issues under Rule 12(b) of the Federal Rules of Civil Procedure rather than considering the motion a "speaking motion" and directing that the issue be joined pursuant to Rule 56 of the Federal Rules of Civil Procedure?

ARGUMENT

I. THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY AFFIRMED A FEDERAL DISTRICT DECISION AND ORDER DISMISSING THE COMPLAINT AGAINST DEFENDANT JUDGE JOHN AHLGRIMM IN ACCORDANCE WITH THE GUIDELINES ESTABLISHED BY THE UNITED STATES SUPREME COURT.

A. JUDGES ARE IMMUNE FROM CIVIL SUIT UNDER 42 U.S.C. Sec. 1983 FOR ACTS WITHIN THEIR JUDICIAL RULES.

The action of the trial court appealed from by the petitioner and affirmed by order of the United States Court of Appeals for the Seventh Circuit arose pursuant to a motion under Fed. R. Civ. P. 12 (b) (6). The only inquiry on a motion to dismiss an action for failure to state a claim upon which relief can be granted is whether the plaintiff's allegations of wrong-doing are, as a matter of law, encompassed within the terms of the Statute upon which he relies for subject matter jurisdiction. See Gremellion v. Rinaudo, 325 F. Supp. 375 (E.D. La. 1971).

The petitioner alleges that defendant Ahlgrimm is civilly liable under the provisions of 42 U.S.C. Sec. 1983. There is a long line of cases deciding the immunity of judges for civil damages resulting from official acts. We quote the basic case in this regard. Yaselli v. Goff, 156 A.L.R. 1239, 12 F. 2d 369, affirmed 275 U.S. 503 (1927):

> "The Judge cannot be sued in a civil action on a complaint charging that his acts were a result of partiality, malice or corruption."

The immunity from civil prosecution under the Civil Rights Act was noted in Agnew v. Moody, 330 F. 2d 868, 869 (9th Cir. 1964):

> "We have repeatedly held that judges and quasi-judicial officers, including prosecuting attorneys, are immune from suit under the Civil Rights Act for conduct in their official duties."

This is true even though a conspiracy is alleged. The court in Agnew v. Moody, supra, stated further at page 869:

> ". . . and although conspiracy is an essential element of the offense under 42 U.S.C. Sec. 1983, the doctrine of immunity nevertheless applies to acts under that section."

See also the case of Sullivan v. Kelleher, 405 F. 2d 486, (1st Cir. 1968), wherein the court stated at page 487:

> "The immunity afforded to judges 'extends to other officers of government whose duties are related to the judicial process' . . . the inclusion of opprobrious epithets such as alleging that a judicial officer acted maliciously or corruptly adds nothing to the legal complaint . . ."

The reports are replete with decisions granting immunity to myriad judicial or quasi-judicial officers. Rhodes v. Meyer, 334 F 2d 709 (8th Cir. 1964) certiorari denied, 379 U.S. 915 (1964) involving a state supreme court justice, state district judges, prosecuting attorneys, clerks of court, prison officials and members of the state integrated bar, sheriffs and law enforcement officers;

Harmon v. Superior Court, 329 F. 2d 154 (9th Cir. 1964) involving state judges, district attorney, sheriff, county clerk, probation officer, court trustee, county auditor and county treasurer; Puett v. City of Detroit, 323 F. 2d 591 (6th Cir. 1963), involving a municipal judge, assistant prosecuting attorney and corporation counsel; Cooper v. Wilson, 309 F. 2d 153 (6th Cir. 1962) involving a private attorney; Wise v. City of Chicago, 308 F. 2d 364 (7th Cir. 1962) certiorari denied, 372 U.S. 944 (1963), involving a city prosecuting attorney; Drum v. Gazzola, 216 F. 2d 709 (1st Cir. 1954), involving a police officer, superintendent of a reformatory and a state commissioner of correction; Rhodes v. Houston, 202 F. Supp. 624 (D.C. Neb. 1962) affirmed, 309 F. 2d 929 (8th Cir. 1962), certiorari denied 372 U.S. 909 (1963) involving a district judge, prosecuting attorney, clerk of court, and in certain instances, law enforcement officers and wardens.

The specific question of the civil liability of judges under the provisions of 42 U.S.C. Sec. 1983 was presented to the United States Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967). In that case, the Court said that the general provisions of 42 U.S.C. Sec. 1983 making "every person" liable for discriminatory actions does not control the immunity of judges to civil suit. "The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." Pierson v. Ray, supra, at pages 554-5.

B. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY AFFIRMED THE FINDING THAT DEFENDANT JUDGE JOHN AHLGRIMM WAS ACTING WITHIN HIS JUDICIAL ROLE DURING THE ACTS COMPLAINED OF BY THE PETITIONER.

The United States Court of Appeals for the Seventh Circuit has considered the purview of "judicial role" in Jacobsen v. Schaeffer, 441 F. 2d 127 (7th Cir. 1971), wherein Judge Duffy wrote at page 129:

> "Jurisdiction then is the test (of judicial role) and it too has been further refined. If a judge is viewed as acting 'in excess' of his jurisdiction, he still will be immune from suit. It is only when he has acted in the 'clear absence of all jurisdiction over the subject matter' that he may be sued for damages."

Resolution of this question, then, rests on whether Judge Ahlgrimm acted in the "clear absence of all jurisdiction over the subject matter." Both case law and statutory law support the proposition that Ahlgrimm had jurisdiction over the subject matter. The petitioner cites Estate of Mayer, 29 Wis. 497, 504-5, 139 N.W. 2d 111, 115 (1966) as authority for the proposition that Judge Ahlgrimm lost all jurisdiction over the case of Hansen v. Hansen when an appeal was taken from the divorce Judgment. (Petitioner's Brief for Certiorari at 14). The Court in Mayer goes on to qualify that rule:

> "This rule does not deprive the trial court of jurisdiction to hear and determine a matter

> which is separate from and independent of the matter determined by the judgment or order appealed from."

Estate of Mayer, supra. This qualification was reaffirmed by the Wisconsin Supreme Court in Hunter v. Hunter, 44 Wis. 2d 618, 621, 172 N.W. 2d 167, 169 (1969).

> "However, in matters not directly concerned with the appeal but still a part of the case, the trial court may properly retain its jurisdiction."

The case law basis for Judge Ahlgrimm's jurisdiction is supported by governing state statutory provisions. Sec. 247.39 Wisconsin Statutes provides "alimony or OTHER ALLOWANCE for a spouse or children when an appeal of a divorce or legal separation action is pending before the Supreme Court may be allowed under Supreme Court Rule 251.72." (Emphasis added)

Sec. 251.72 Wisconsin Statutes provides that only the trial court shall order an allowance or temporary alimony while a divorce or legal separation is pending on appeal.

Sec. 274.17 Wisconsin Statutes provides for the undertaking to stay the execution on money judgment and we quote Sec. 274.17 Wisconsin Statutes:

> "Sec. 274.17 Undertaking to stay execution on money judgment. If the appeal be from a judgment directing the payment of money it shall not stay the execution of the judgment unless an undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from or any

part thereof be affirmed the appellant will pay the amount directed to be paid by the judgment or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal."

Wisconsin Statutes Sec. 247.37 provides for the effect of the judgment of a divorce and we quote Sec. 247.37:

"247.37 Effect of judgment of divorce. (1)(a) When a judgment of divorce is granted it shall not be effective so far as it affects the marital status of the parties until the expiration of one year from the date of the granting of such judgment, except that it shall immediately bar the parties from cohabitation together and except that it may be reviewed on appeal during said period. But in case either party dies within said period, such judgment, unless vacated or reversed, shall be deemed to have entirely severed the marriage relation immediately before such death. The written judgment shall include the substance of the preceding language; and if the court orders alimony or other allowance for the wife or children or retains jurisdiction in such matters, the written judgment shall include a provision that disobedience of the court order with respect to the same is punishable under Sec. 295.03 by commitment to the county jail or house of correction until such judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to law. The findings of fact and conclusions of law and the written judgment shall

be drafted by the attorney for the prevailing party, and shall be submitted to the court and filed with the clerk of the court within thirty days after judgment is granted; but if the action has been uncontested, they shall first be submitted to opposing counsel, if any, and if the family court commissioner has appeared in the action, such original papers, together with copies thereof, shall also be sent to him for examination before submission of the same to the court." (Emphasis added)

The judgment required the defendant to perfect certain transfers of assets as allowance for the wife. The judgment also contained the customary disobedience clause punishable under Sec. 295.03 of the Wisconsin Statutes by commitment to the county jail for failing to comply with the terms of the final judgment. We quote Sec. 295.03 of the Wisconsin Statutes:

"295.03 Prison or house of correction for refusal to pay costs. When any order of the court or a judge shall have been made requiring the payment of costs or any other sum of money and proof by affidavit shall be made of the personal demand of such sum of money and of a refusal to pay it the court or judge may issue a warrant to commit the person so disobeying to prison or a house of correction until such sum and costs and expenses of the proceedings shall be paid. Where an order of the court, or a judge, in an action for divorce or legal separation, requires the payment of a sum or sums of money, the personal service of such order has been made upon the defendant, no proof of personal demand of such sum of

money and a refusal to pay shall be required before the defendant is punished as provided in this section."

The petitioner misconstrues the application of the above cited statutes. In petitioner's Brief for Certiorari at 14, the plaintiff-petitioner alleges that both Secs. 247.37 and 247.39 Wisconsin Statutes are immaterial to the issues in the instant case on the basis that they apply only to alimony or support orders during the pendency of an appeal. Such interpretation is far too narrow for the Statute. In each case, the Statute provides that "alimony or other allowances" may be declared by the trial court during the pendency of an appeal, not just alimony or support orders as the petitioner would suggest.

The court retained jurisdiction and was exercising its prerogatives on the basis of the applicable state statutes to enforce the orders of the court by commitment to county jail if necessary. Having retained jurisdiction, Judge Ahlgrimm was acting "within his judicial role" and is, therefore, immune from civil liability under the provisions of 42 U.S.C. Sec. 1983 by the rule of Pierson v. Ray, 386 U.S. 547 (1967).

II THE ORDER OF THE UNITED STATES CIRCUIT COURT FOR THE SEVENTH CIRCUIT PROPERLY AFFIRMED THE DECISION OF THE DISTRICT COURT ON THE MOTION TO DISMISS.

Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed if clearly without merit; and this want of merit may consist in an absence of law to support a claim of the sort made or in the disclosure

of some fact which will necessarily defeat the claim. See 2A Moore's Federal Practice, Sec. 12.08, p. 2271.

In analyzing the plaintiff's complaint on a motion to dismiss, only the well-pleaded material allegations are taken as admitted. See Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965). When alleging conspiracy in violation of 42 U.S.C. Sec. 1983, facts must be pleaded describing the conspiracy and the extent to which it connected the private citizen to the state. In the absence of such a pleading, the complaint is insufficient. See Guidry v. Ford, 431 F. 2d 660, 664 (5th Cir. 1970). The absence of a sufficient pleading describing the conspiracy and the connection between the private citizen to the state left the instant complaint insufficient.

Further, on a motion to dismiss, the court can take judicial notice of Wisconsin law, and was not bound to accept conclusory allegations in the plaintiff's complaint. See Merriam v. Kunzig, 476 F. 2d 1233, 1239 (3rd Cir. 1973). In the instant case, the Court did view the well-pleaded allegations as admitted, and viewed them in a light most favorable to the plaintiff. However, the trial court was not obligated to accept as true the legal conclusions alleged in the complaint that defendant Judge Ahlgrimm acted without jurisdiction. The court was free to take judicial notice of Wisconsin law, and in the exercise of that discretion found the plaintiff's Brief failed to state a claim upon which relief could be granted.

The petitioner claims that the Court of Appeals erred in affirming the District Court's decision in

that the interpretation given by the District Court to Wisconsin Statutes was unsupported. This allegation must be denied in light of Wisconsin case law and the power of federal courts to take judicial notice of such law. The taking of judicial notice of a decision of the Supreme Court of the State where law is pertinent to the case has been recognized in the federal courts. See Florida Power Corporation v. Pinellas Utility Board, et al., 181 F. 2d 547 (5th Cir. 1950). Citing this power, the United States Circuit Court for the Seventh Circuit noted properly that Freeman Printing Co. v. Luebke, 36 Wis. 2d 298, 152 N.W. 2d 861 (1967) and Carpenter Baking Co. v. Bakery S.D. Local Union, 237 Wis. 24, 8 N.W. 2d 636 (1941), supported the District Court's finding on the jurisdiction of Judge Ahlgrimm's court after appeal.

The only matters de hors the record considered by either the District Court or the Appellate Court were matters properly within the purview of the Court's power to take judicial notice. The motion was not, therefore, treated as "speaking motion". Rather, it was properly treated as a motion to dismiss and decided by the use of powers given to the Court.

III. THE UNITED STATES SUPREME COURT SHOULD DENY THE PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI BECAUSE IT REQUESTS REVIEW OF A CASE BEFORE FINAL JUDGMENT HAS BEEN GIVEN IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner seeks review of an Order of the United States Court of Appeals for the Seventh Circuit which affirmed without oral argument two

of four issues presented by the petitioner's appeal. However, two of the four issues raised by the petitioner on appeal are presently before the Circuit Court of Appeals and are awaiting oral argument.

The respondent would urge that the petitioner's request for a Writ of Certiorari be denied on the basis of Rule 20 of the United States Supreme Court, 398 U.S. 1031 (1970) providing:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

In the instant case, two of the four issues urged by the petitioner in the court of appeals are still to be argued and decided. Since the petitioner has not shown that the case is of such imperative public importance as to justify deviation from normal appellate processes, the petition for a Writ of Certiorari should be denied.

CONCLUSION

As the Order of the Court of Appeals noted, the petitioner fails to adequately support his theories of immunity or civil procedure. In both the District Court and the Court of Appeals, it was noted that only well-pleaded material allegations were to be taken as admitted on a motion to dismiss. The allegations of the absence of immunity for defendant Judge John Ahlgrimm were and are unsupported. The petitioner failed to properly analyze Wisconsin

statutory provisions as interpreted by the Wisconsin Supreme Court. The petitioner also objects to the exercise of the power of judicial notice by the lower courts, but fails to cite authorities upon which to base this objection.

The facts and arguments which the petitioner presents do not form a substantial foundation for the United States Supreme Court to exercise the sound discretion and grant a Writ of Certiorari. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

DENNIS J. FLYNN
Attorney for Respondent
John C. Ahlgrimm

APPENDIX

APPENDIX A

CONSTITUTIONAL PROVISIONS, TREATIES AND FEDERAL STATUTES INVOLVED

42 U.S.C. Sec. 1983. Civil Action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fed. Rules of Civil Procedure 12(b)

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other

defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

APPENDIX B

STATE STATUTES INVOLVED

247.30 Alimony, payment of and security for.

In all cases where alimony or other allowance shall be adjudged to either party or for the support or education of the children the court may provide that the same shall be paid in such sums and at such times as shall be deemed expedient, and may impose the same as a charge upon any specific real estate of the party liable or may require sufficient security to be given for payment according to the judgment; and upon neglect or refusal to give such security or upon the failure to pay such alimony or allowance the court may enforce the payment thereof by execution or under s. 295.03 or otherwise as in other cases. No such judgment shall become effectual as a charge upon specific real estate until the judgment or a certified copy thereof is recorded in the office of the register of deeds in the county in which the real estate is situated. History: 1971 c. 220.

247.37 Effect of judgment of divorce (1)(a)

When a judgment of divorce is granted it shall not be effective so far as it affects the marital status of the parties until the expiration of 6 months from the date of the granting of such judgment, except that it shall immediately bar the parties from co-habitation together and except that it may be reviewed on appeal during said period. But in case either party dies within said period, such judgment, unless vacated or reversed, shall be deemed to have

entirely severed the marriage relation immediately before such death. The written judgment shall include the substance of the preceding language; and if the court orders alimony or other allowances for a party or children or retains jurisdiction in such matters, the written judgment shall include a provision that disobedience of the court order with respect to the same is punishable under s. 295.03 by commitment to the county jail or house of correction until such judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to law. The findings of fact and conclusions of law and the written judgment shall be drafted by the attorney for the prevailing party, and shall be submitted to the court and filed with the clerk of the court within 30 days after judgment is granted; but if the action has been uncontested, they shall first be submitted to opposing counsel, if any, and if the family court commissioner has appeared in the action, such original papers, together with copies thereof, shall also be sent to him for examination before submission of the same to the court.

247.39 Alimony or other allowance pending appeal.

Alimony or other allowance for a spouse or children when an appeal of a divorce or legal separation action is pending before the supreme court may be allowed under Supreme Court Rule 251.72.

251.72 Rule (Allowances in actions affecting marriage).

In actions affecting marriage pending in this court, no allowance for suit money, counsel fees or disbursements in this court, nor for temporary alimony or maintenance of the wife or children during the pendency of the appeal will be made in this court.

Such allowances, if made at all, shall be made by the proper trial court upon motion made and decided after the entry of the order or judgment appealed from and prior to the return of the record to this court, provided, that if such allowance be ordered before the appeal is taken such order shall be conditioned upon the taking of the appeal and shall be without effect unless and until the appeal be perfected.

274.11 Appeal, how taken and perfected; notice; costs.

(1) An appeal is taken by serving a notice of appeal signed by the appellant or his attorney on each party adverse to him upon the appeal who appeared in the action or proceeding, and by filing a notice of appeal with the clerk of the court in which the judgment or order appealed from is entered. The notice shall state whether the appeal is from the whole of the judgment or order or from a part thereof, and if from a part only, shall specify the part appealed from. On appeals from a judgment the appellant shall serve the notice of appeal upon all parties bound by the judgment who have appeared in the action. All notices of appeal

shall contain the names and addresses of counsel, if known, for all parties upon whom service is required.

(2) An appeal may embrace two or more orders and may include or omit the judgment. In such case the notice of appeal shall designate with reasonable certainty the orders appealed from, or the part of them or either of them, or of the judgment appealed from. But one undertaking shall be required on such appeals, which shall be in the terms prescribed by subsection (3), except where the conditions thereof may be fixed by the court or judge, in which case the undertaking shall conform to the order made or directions given. If the appellant shall succeed in whole or in part he shall be allowed costs unless the supreme court determines otherwise. An appeal shall be deemed perfected on the service of the undertaking for costs or the deposit of money instead, or the waiver thereof. When service of such notice and undertaking cannot be made within this state the court may prescribe a mode of serving the same.

(3) The appeal undertaking must be executed on the part of the appellant by at least two sureties, to the effect that he will pay all costs and damages which may be awarded against him on the appeal, not exceeding $250.

(4) The right of appeal shall exist from the time of the entry of the appealable order or judgment and in cases of appeal the supreme court shall have jurisdiction over the subject matter of the action from that time. The procedural requirements of subs. (1), (2) and (3)

and of this chapter shall relate only to the jurisdiction of the court over the parties to the appeal.

Cross References: As to filing an undertaking guaranteed by a surety company instead of by individual sureties, see 204.07. As to perfecting a defective appeal, see 274.32.

274.17 Undertaking to stay execution on money judgment.

If the appeal be from a judgment directing the payment of money it shall not stay the execution of the judgment unless an undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from or any part thereof be affirmed the appellant will pay the amount directed to be paid by the judgment or the part of such amount at to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal.

295.03 Prison or house of correction for refusal to pay costs.

When any order of the court or a judge shall have been made requiring the payment of costs or any other sum of money and proof by affidavit shall be made of the personal demand of such sum of money and of a refusal to pay it the court or judge may issue a warrant to commit the person so disobeying to prison or a house of correction until such sum and costs and expenses of the proceedings shall be paid.

Where an order of the court, or a judge, in an action for divorce or legal separation, requires the payment of a sum or sums of money and personal service of such order has been made upon the defendant, no proof of personal demand of such sum of money and a refusal to pay shall be required before the defendant is punished as provided in this section.